2001 BNH 033 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Eric T. Schultz and
Louise M. Schultz,
Debtors

Bk. No. 00-10581-JMD
Chapter 13

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MEMORANDUM OPINION

I. BACKGROUND

The Court held an evidentiary hearing on the issue of whether the Debtors' Chapter 13 plan may modify the secured claim of Associates Housing Finance, LLC ("AHF"). As set forth in a prior memorandum opinion, see Schultz v. AMEJRE, LLC (In re Schultz), 2001 BNH 014, the Debtors entered into an agreement on October 17, 1998 to purchase a manufactured housing unit (the "Manufactured Home") to replace their existing home. The unit was to be placed on the Debtors' land on Winter Street Extension in Claremont, New Hampshire, land which the Debtors have owned since 1977. On October 20, 1998, the Debtors applied to AHF for a loan to (1) refinance the existing mortgage on their land on Winter Street; (2) finance their purchase of the Manufactured Home; (3) finance the installation of the Manufactured Home; and (4) finance related improvements to the Debtors' land. Id. at 5. On December 10, 1998, the Debtors signed a note, a mortgage, and a manufactured housing unit rider, which gave AHF a

security interest in the real estate located on Winter Street in Claremont together with all improvements on the property including, specifically, the Manufactured Home being purchased. Id. at 5-7.

On or about March 8, 1999, the Manufactured Home was placed on the Debtors' real estate in Claremont. Id. at 6. Shortly after its installation the Debtors noticed problems with the Manufactured Home as well as the foundation upon which it was placed. Id. In August 1999, the Debtors brought suit in Sullivan County Superior Court against AHF and the seller of the Manufactured Home. Pursuant to a stipulation the Debtors and AHF executed in September 1999, the Debtors agreed to deposit regular monthly mortgage payments into an interest bearing escrow account. See Exhibit 2.

In December 1999, the Debtors determined that the Manufactured Home was unsafe and requested a permit from the City of Claremont in order to place a second housing unit on their Winter Street property. See Exhibit 105. The city issued a permit and the Debtors moved into the second housing unit (the "Mobile Home") shortly before Christmas 1999. According to the Debtors, they disconnected all of the utilities to the Manufactured Home and had them re-connected to the Mobile Home. They moved all of their belongings, except a few boxes of their daughter's belongings, out of the Manufactured Home and into the Mobile Home. The Debtors' permit from the City of Claremont indicated that this arrangement was temporary and that one of the two housing units on the Debtors' property was required to be removed by June 15, 2000 in order to bring the property back into compliance with the city's zoning and land use ordinances. Exhibit 3.

On March 3, 2000, the Debtors filed a Chapter 13 bankruptcy petition. At that time, the Debtors were still living in the Mobile Home they had placed on their real estate in Claremont. During the fall of 2000, the Debtors sold the Mobile Home and moved into an apartment across the street from their property. In early June 2001, a few weeks prior to the date of the Court's hearing on this matter, the Debtors moved back into the Manufactured Home. The Debtors testified at the hearing that they were unsure how long they would remain living in the Manufactured Home, despite expert reports that the home is structurally sound. Mrs. Schultz testified that she does not feel safe living in the home especially in the winter months.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

The issue before the Court is whether the Debtors may bifurcate the claim of AHF given the restrictions of 11 U.S.C. § 1322(b)(2) regarding security interests in principal residences. Section 1322(b)(2) of the Bankruptcy Code specifically provides:

> Subject to subsections (a) and (c) of this section, the plan may–
> . . .
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holder of any class of claims.

11 U.S.C. § 1322(b)(2) (emphasis added). Here, the Debtors' plan provides for a cramdown of AHF's claim. See Doc. No. 4. AHF objects to the cramdown on the grounds that its mortgage is secured only by the Debtors' principal residence and therefore the provisions of section 1322(b)(2) prevent modification of its claim. See Doc. No. 34. The Debtors argue that AHF's claim can be modified because AHF's claim is not secured only by a security interest in the Debtors' principal residence since (1) at the time the Debtors filed bankruptcy they were not living in the Manufactured Home, and (2) AHF had a security interest in funds being held in escrow by the Debtors' attorney.

In determining whether the Manufactured Home was the Debtors' principal residence within the meaning of the Bankruptcy Code the parties agree that the Court should look to the facts and circumstances existing on the petition date. See In re Wetherbee, 164 B.R. 212, 215 (Bankr. D.N.H. 1994) (holding that the relevant point of inquiry under section 1322(b)(2) is the date of the filing of the Chapter 13 petition); see also In re Churchill, 150 B.R. 288, 289 (Bankr. D. Me. 1993) (applying the "plain meaning" rule and holding that the petition date is the date that controls). Cf. GMAC Mortgage Corp. v. Marenaro (In re

Marenaro), 217 B.R. 358, 360 (B.A.P. 1st Cir. 1998) (declining to set forth a rule regarding when to look at the status of the property, e.g., date the mortgage was granted, date the petition was filed, or "some other point in time not yet endowed with judicial acceptance").

It is undisputed that on the petition date the Debtors were actually living in the Mobile Home not the Manufactured Home. The Debtors testified that they believed that the Manufactured Home was uninhabitable at that time due to cracks in the foundation. The Debtors further testified that they were unsure what their intentions were regarding their future living situation. They acknowledged, however, that at least one of the two units needed to be removed from the property by June 15, 2000 in order to comply with city zoning and land use ordinances.

In order to determine what was the Debtor's principal residence on the petition date, the Court must examine the meaning of the phrase "real property that is the debtor's principal residence." Neither the term "real property" nor the term "principal residence" is defined by the Bankruptcy Code. See In re Spano, 161 B.R. 880, 884 (Bankr. D. Conn. 1993). Accordingly, the Court will look to state law to determine the meaning of these terms. See id. Pursuant to RSA 21:21, the words "real estate" include "lands, tenements, and hereditaments, and all rights thereto and interest therein." The statute makes clear that the term "manufactured housing" is included in the term "real estate." RSA 21:21(II). RSA 21:6-a contains the following definition of "residence."

> Residence or residency shall mean a person's place of abode or domicile. The place of abode or domicile is that designated by a person as his principal place of physical presence for the indefinite future to the exclusion of all others. Such residence or residency shall not be interrupted or lost by a temporary absence from it, if there is an intent to return to such residence or residency as the principal place of physical presence.

RSA 21:6-a.

At the time the Debtors filed their petition they were living in the Mobile Home on land located on Winter Street in Claremont. In other words, the Debtors were continuing to reside on the same parcel of real estate, or the same "place," on which they had resided since 1977. The Debtors argue that it is significant that the Debtors were living in the Mobile Home and not in the Manufactured Home at the time

their bankruptcy was filed. The Court does not find that distinction crucial under the facts of this case where the Debtors continued to reside at the same location. The evidence established that the Debtors understood that one of the two housing units on the Winter Street parcel would need to be removed within six months after issuance of the permit for the second unit. In addition, as of the petition date, the Debtors had not determined which of the two units would remain on the Winter Street parcel. When the permit deadline passed, the Debtors moved across the street into a trailer owned by a third party on a month to month lease. When that party demanded a one year lease, the Debtors determined that they could not afford such an arrangement and moved back into the Manufactured Home. The Court finds no intention by the Debtors to claim a new "principal place" as their residence. Rather, viewing the evidence objectively, the Court finds that the Debtors had designated the "real property" on Winter Street in Claremont as their "principal place of physical presence for the indefinite future to the exclusion of all others." See RSA 21:6-a. Further the Court notes that the state statute makes clear that a person's residence is not lost by a temporary absence from it as long as there is an intent to return to it. While the Debtors would not admit that on the petition date they intended to return to the Manufactured Home, it is clear that the Debtors are presently living in it. This evidence supports an inference that the Debtors intend to maintain their principal place of residence on the parcel of land that they have owned on Winter Street in Claremont since 1977.

In addition, the Court notes that the Debtors fail to recognize that AHF has a security interest in the land on Winter Street and as well as all of the improvements on it. There was no testimony by the Debtors that the land and/or the homes on it were used for anything other than the Debtors' residence. Thus, the Court is not faced with a situation where one of the buildings was or could be used as rental property. See Lomas Mortgage v. Louis, 82 F.3d 1, 1-2 (1st Cir. 1996) (holding that the antimodification provision of section 1322(b)(2) does not bar modification of secured claims on multi-unit property in which one unit is the debtor's principal residence and the security interest extends to other income-producing units).

The Court finds the facts of this case similar to those in In re Lee, 137 B.R. 285 (Bankr. E.D. Wis. 1991). In the Lee case the debtor lived in a duplex that was in need of "much repair and rehabilitation." Id.

at 286. The debtor lived in the downstairs unit. The upstairs unit was vacant and had not been rented for several years and in fact could not "either legally or practically" be rented at the time of the hearing. Id. Most of the plaster on the walls and the ceiling of the upstairs unit had fallen off due to past roof leakage and the unit did not have a working furnace. In addition, new carpeting and paint were badly needed and two inches of mud or sludge from "bad plumbing and/or sewer back up" were on the basement floor. Id. The court in the Lee case held that the mortgagee's property rights could not be modified as the mortgagee's claim was secured only by a security interest in the debtor's principal residence; the possibility of renting out the second unit did not create additional security for the mortgagee. Id. at 287. See also Marenaro, 217 B.R. at 360-61 (holding that the debtor's property was solely the debtor's residence even though its three lots could have been divided and used for something else).

The Court holds that the Debtors may not modify AHF's secured claim on the grounds that the Manufactured Home was not their principal residence at the time they filed their bankruptcy petition in March 2000. Cf. In re LeBrun, 185 B.R. 665, 666 (Bankr. D. Mass. 1995) (permitting modification since at the time the petition was filed the debtor no longer occupied the property and in fact used the property to generate rental income); In re Saglio, 153 B.R. 4, 5 (Bankr. D.R.I. 1993) (holding that the mortgagee's claim could be modified as the property was no longer the debtor's principal residence on the petition date as the debtor had vacated the premises more than a year previously and had changed both his voter registration and vehicle registration to a new address). At the time the Debtors filed their Chapter 13 petition, they were residing on the real estate located on Winter Street although not in the Manufactured Home they purchased with financing from AHF.

The Debtors also argued that the escrow account established in the state court lawsuit serves as additional collateral that would remove AHF from the protection of section 1322(b)(2). AHF argues that the escrow account represents prepetition principal and interest payments, i.e., past indebtedness due AHF, which does not provide additional or added value to AHF.

In In re Smith, 176 B.R. 298 (Bankr. D.N.H. 1994), the Court first adopted the French test for determining whether a mortgage is secured by additional collateral. See In re French, 174 B.R. 1, 7 (Bankr. D. Mass. 1994). See also Marenaro, 217 B.R. at 360 (applying the French rule and noting that all of the bankruptcy judges in the First Circuit who have faced the issue have followed Judge Boroff's analysis in French). As articulated in French, the test is whether the alleged "additional collateral" is merely "an enhancement which is or can, by agreement of the parties, be made a component part of the real property or is of little or no independent value." French, 174 B.R. at 7 (quoted in Smith, 176 B.R. at 301, and Fountain, 197 B.R. 748, 751 (Bankr. D.N.H. 1996)). "The existence of collateral which is nothing more than such an enhancement should not result in a forfeiture by the lender of the anti-modification provisions of § 1322(b)(2)." Id. (quoted in Smith, 176 B.R. at 301, and Fountain, 197 B.R. at 751). The Court finds that the escrow account in this case did not constitute "additional collateral" sufficient to defeat the protection afforded AHF under the anti-modification provision of section 1322(b)(2). See In re Libby, 200 B.R. 562, 567 (Bankr. D.N.J. 1996) (holding that the use of a tax escrow account in conjunction with the first mortgage did not constitute "additional security" sufficient to permit bifurcation of the secured creditor's claim). The escrow account in this case was not established for the purpose of providing additional collateral for AHF's mortgage. Rather, monies were set aside in escrow to prevent a prepetition loan default pending the outcome of the state court litigation. The Court notes that until a judicial determination is made that the escrow funds actually belong to AHF, it is just as likely that the money will be returned to the Debtors. Accordingly, such funds can not serve as additional collateral for AHF. The Court finds that AHF did not hold a security interest in anything more than the Debtor's residence.

III. CONCLUSION

The Court concludes that the AHF's secured claim is protected by section 1322(b)(2) and cannot be modified as proposed in the Debtors' Chapter 13 plan. AHF's objection to confirmation is sustained and

confirmation of the Debtors' Chapter 13 plan is denied. Based on these rulings, the Court need not determine the value of the Debtors' Manufactured Home.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 12th day of July, 2001, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge